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In the Supreme Court of the United States

OCTOBER TERM, 1994

UNITED STATES OF AMERICA, ET AL., PETITIONERS

v.

NATIONAL TREASURY EMPLOYEES UNION, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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In attacking the honorarium ban, respondents invoke a stringent standard of First Amendment review by magnifying the ban's impact on speech and understating the deference due to Congress's judgment about the dangers caused by the payment of honoraria to Executive Branch employees. At the same time, respondents acknowledge (Br. 14, 45-46) that the sweeping remedy ordered by the court of appeals is not necessary to vindicate their constitutional rights. Respondents' arguments on the merits do not justify even a partial invalidation of the honorarium ban. In light of their concession about the unneeded breadth of the court of appeals' remedy it is clear, in all events, that the judgment below cannot stand.

A. The Merits. Respondents acknowledge (Br. 24) that, under this Court's precedents, the regulation of employee speech is judged under the balancing test announced in *Pickering* v. *Board of Educ.*, 391 U.S. 563 (1968). Yet respondents would skew the application of that balance in two ways. First, they attach greater weight than is justified to the employees' side of the scales for a limitation, not of speech, but of compensation for speech. Second, they give insufficient weight to Congress's determination about what honoraria regulations are required to prevent abuses and appearances of abuses by Executive Branch employees.

1. *The honorarium ban does not prohibit speech*

a. Respondents argue that the honorarium ban "significantly burdens the exercise of First Amendment rights," because it makes it "more expensive" and "more difficult" for Executive Branch employees to write or speak publicly and because it "saps incentive" to do so. Resp. Br. 12, 16. They contend (Br. 16, 21-22) that under *Simon & Schuster, Inc.* v. *Members of the New York State Crime Victims Bd.*, 112 S. Ct. 501 (1991), *Meyer* v. *Grant*, 486 U.S. 414 (1988), and *Riley* v. *National Fed'n of the Blind*, 487 U.S. 781 (1988), the ban's burden on speech cannot be deemed modest in the *Pickering* balance.

The economic impact of the ban on the receipt of honoraria by employees for some types of speech concededly brings First Amendment interests into play. But these interests must be placed in context. The ban does not prohibit or punish *any* writing or speaking by government employees. Nor does it prevent employees from recovering their actual and necessary expenses when they write articles, give speeches, or make appearances. Gov't Br. 16. This is not a case like *Simon & Schuster*, which involved a law that required authors

who were members of the general public to surrender all income from certain kinds of works. The honorarium ban applies only to persons who are employed by and who draw salaries from the federal government. Respondents, for example, are all "currently employed full-time" in executive agencies and departments. Pet. App. 60a. Respondents thus err in relying on decisions that address financial burdens on the speech of private citizens. See Resp. Br. 16, 22. Respondents are not solely, or presumably even primarily, dependent for their livelihood on their income from writing or speaking, and that factor is important in evaluating the impact that the honorarium ban has on their freedom to speak.

It is far from clear, for example, that the respondents themselves regard the financial rewards of writing as their main incentive. One of the respondents attested that "[r]elative to my government salary, I did not earn a great deal of money from this endeavor—no more than $3,000 annually," and "would probably continue to do so even without pay." J.A. 78. That author was hindered, however, because his preferred place of publication, the Washington Post, chose not to accept "donated" articles. *Ibid.* The government is not accountable for such publication policies, or for the actions of professional bodies that, for reasons of their own, "strongly discourage or prohibit their members from writing without compensation." Resp. Br. 9. In any event, the honorarium ban need not constitute a deterrent even in that situation because it permits an honorarium to be paid "on behalf of the * * * employee to a charitable organization." 5 U.S.C. App. 501(c) (Supp. IV 1992).

b. Nor does the honorarium ban warrant "especially close scrutiny," despite the fact that it prohibits no speech, because it "target[s] and single[s] out speech for disfavored treatment." Resp. Br. 17. Respondents again

rely here (*ibid.*) on cases involving regulation of speech by the public at large. *E.g.*, *Arkansas Writers' Project, Inc.* v. *Ragland*, 481 U.S. 221 (1987); *Minneapolis Star & Tribune Co.* v. *Minnesota Comm'r of Revenue*, 460 U.S. 575 (1983). But this Court developed the *Pickering* balancing test for judging government employees' constitutional claims in order to gauge regulations that targeted and singled out speech. 391 U.S. at 568; see *Connick* v. *Myers*, 461 U.S. 138, 142 (1983). And the Court has applied that test in rejecting an attack on the Hatch Act, which operated exclusively to restrict the exercise of political rights at the core of the First Amendment. *CSC* v. *National Ass'n of Letter Carriers*, 413 U.S. 548, 564 (1973). In none of those cases was the regulation's focus on speech a reason in itself for increasing the weight of the employees' interest.

In any event, respondents' assertion (Br. 18) that "there is no characteristic to the writing and speaking activities of career employees that makes them 'special' * * * when compared to other outside income-producing activities" is incorrect. Honoraria for appearances, speeches, and articles are particularly prone to abuse because the activities that occasion those payments may easily be the product of little or no genuine effort by the employee. Gov't Br. 19. Congress had ample historical basis for concluding that the problems of abuse, and perception of abuse, associated with the receipt of honoraria by government employees for appearances at conventions and similar activities warranted particular focus, as compared with the issues raised when employees earn extra money by taking a second job. See pp. 8-9, 12, *infra*. The First Amendment does not prevent Congress from limiting its reform attempts to activities that have actually caused problems. "[R]eform may take one step at a time, addressing itself to the phase of the

problem which seems most acute to the legislative mind." *Buckley* v. *Valeo*, 424 U.S. 1, 105 (1976) (per curiam); see also *id.* at 105 n.143.

Respondents also seek to increase the weight of their First Amendment interests by noting (Br. 18-20) that the honorarium ban permits compensation for certain forms of expression, such as the writing of books, poetry, or works of fiction. It would, however, be odd if the Constitution required Congress to ban compensation for *all* speech in order to prevent receipt of payments in situations where abuses have occurred. And it is equally odd for respondents to argue (Br. 19-20) that the honorarium ban is particularly burdensome because it may require some governmental review of the content of the expression (*i.e.*, to determine whether the expression is fiction or nonfiction, a book or an article, a speech or a recitation of poetry). The honorarium ban is far less concerned with the content of speech than is normally true in a *Pickering* case. In the typical case, the public employer has imposed discipline on an employee precisely *because* of the nature and meaning of what the employee has said. Those situations pose a far greater threat of censorship than the honorarium ban. The honorarium ban is not intended to suppress any speech, let alone speech of a particular content or viewpoint. In sum, the ban's focus on *payment* rather than speech, its viewpoint-neutral character, and its inapplicability to practices that had not been areas of abuse all serve to minimize its intrusion on First Amendment values.

2. *The honorarium ban is sufficiently justified and properly tailored*

a. Respondents contend (Br. 23-28) that the deference due to congressional judgments expressed in *United Public Workers* v. *Mitchell*, 330 U.S. 75, 101 (1947), is outmoded in light of more recent decisions (Br. 27).

Respondents also appear to take the view that the absence of explicit legislative history explaining the honorarium ban's application to Executive Branch employees requires "*more* * * * rigorous [review] than that usually applied in the public employment context" (Br. 26).

Those claims are mistaken. As recently as last Term, a plurality of this Court cited *Mitchell* with approval, noting that the Court has

> consistently given greater deference to government predictions of harm used to justify restriction of employee speech than to predictions of harm used to justify restrictions on the speech of the public at large. Few of the examples we have discussed [earlier in the opinion] involve tangible, present interference with the agency's operation. The danger in them is mostly speculative. One could make a respectable argument that political activity by government employees is generally not harmful, see *Public Workers v. Mitchell*, *supra*, 330 U.S. at 99, * * * [b]ut we have given substantial weight to government employers' reasonable predictions of disruption, even when the speech involved is on a matter of public concern, and even though when the government is acting as sovereign our review of legislative predictions of harm is considerably less deferential.

Waters v. *Churchill*, 114 S. Ct. 1878, 1887 (1994) (plurality opinion).[1]

[1] Respondents rely (Br. 24, 37 n.33) on *Churchill*'s statement that "[i]n many such situations the government may have to make a substantial showing that the speech is, in fact, likely to be disruptive before it may be punished." 114 S. Ct. at 1887 (plurality opinion). The "situations" to which the opinion alluded are employer efforts to sanction speech *because* of its content. See *ibid.*, citing *inter alia*, *Connick* v. *Myers*, 461 U.S. at 152. Here, the government is not prohibiting speech, but payment for speech, and it is not concerned with speech of any particular content. Accordingly, the proper approach is to give "deference to government predictions of harm used to justify restriction of employee speech." *Churchill*, 114 S. Ct. at 1887 (plurality opinion).

The deference due to Congress's judgment is certainly not unlimited; Congress must act reasonably. But legislation in this area is not unconstitutional merely because the legislative history does not contain an explicit discussion of why Congress chose to draw the precise lines that it did. See *Buckley* v. *Valeo*, 424 U.S. at 83 (upholding reporting thresholds in campaign finance disclosure laws even though "there is little in the legislative history to indicate that Congress focused carefully on the appropriate level at which to require recording and disclosure"). Nor are respondents on firm ground in invoking (Br. 37) the burden of justification described in the plurality opinion in *Turner Broadcasting Sys., Inc.* v. *FCC*, 114 S. Ct. 2445, 2470-2471 (1994). That case dealt with direct regulation of speech in the private sector; it did not address any issue relating to employee speech, let alone regulation only of an employee's outside compensation for such speech.

b. In this case, the record on which Congress relied included reports of two prestigious ethics panels that recommended a ban on honoraria in all three branches. See Gov't Br. 3-5 & n.11, 19-20 (citing *Fairness for Our Public Servants: The Report of the 1989 Commission on Executive, Legislative and Judicial Salaries* (Dec. 1988) (*Quadrennial Commission Report*); *To Serve With Honor: Report of the President's Commission on Federal Ethics Law Reform* (Mar. 1989) (*Wilkey Commission Report*)). Respondents contend that these

reports "merely recommended an extension to all three branches of a prohibition on acceptance of the type of honoraria historically subject to abuse" (Br. 13), that they used narrow definitions of honoraria that did not reach all of the expression covered by the ban as enacted (Br. 34), and that "[t]he all-encompassing definition of 'honorarium' contained in Section 501(b) goes further than anything contemplated by either commission" (Br. 35). Those claims are incorrect.

The Quadrennial Commission and the Wilkey Commission recommended, not only that honoraria be banned in all three branches, but also that

> honoraria should be defined so as to close present and potential loopholes such as receipt of consulting, professional or similar fees; payments for serving on boards; travel, sport, or other entertainment expenses not reasonably necessary for the appearance involved; or any other benefit that is the substantial equivalent of an honorarium.

Quadrennial Commission Report 24 (J.A. 234); *Wilkey Commission Report* 36 (J.A. 254). The Wilkey Commission added, in support of its "Recommendation 6" that "federal employees in all three branches be prohibited from receiving honoraria," the suggestion that:

> To curtail the risk that individuals will find a way to circumvent these restrictions, the bar on honoraria necessarily needs to extend both to activities related to an individual's official duties and to other activities. * * *
>
> We recognize that banning honoraria would have a substantial financial cost to many officials. We feel strongly, however, that the current ailment is a serious one and that this medicine is no more bitter than is needed to cure the patient.

Wilkey Commission Report 33, 36 (J.A. 249, 254). The Wilkey Commission rejected the view that the honorarium ban should be tied to a pay raise for all federal employees:

> [W]e did not see, in good conscience, how we could suggest holding off on the adoption of our recommendations until pay levels were raised to a more adequate level. * * * [W]e regard the current state of affairs as to honoraria in particular as unacceptable in the extreme, and [we] believe that we cannot wait until an unspecified date in the future to end this harmful practice.

Wilkey Commission Report 38 (J.A. 257).

In enacting the honorarium ban, Congress was justified in relying on these reports, as well as on its own familiarity with federal employment and the problems occasioned by the receipt of honoraria (see Gov't Br. 32). The consensus of the Quadrennial and Wilkey Commissions about honoraria drew on the substantial experience of the members of those bodies with issues of ethics and appearances in federal employment.[2] Moreover, a 1992 report issued by the

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[2] These Commissions included as members individuals with significant experience in public life. The Quadrennial Commission was chaired by former (and present) White House counsel Lloyd N. Cutler and included (among others) the Honorable Thomas F. Eagleton and the Honorable Charles McC. Mathias. *Quadrennial Commission Report* at iii. The Wilkey Commission was chaired by Judge Malcolm R. Wilkey and included (among others) former Attorney General Griffin B. Bell, Mr. Cutler, former White House counsel Fred Fisher Fielding, and Admiral R. James Woolsey. *Wilkey Commission Report* (unnumbered introductory page).

General Accounting Office (GAO Report) documents what Congress must have known through its own oversight activities: that prior federal regulations geared to the content of articles and the identity of the payors of honoraria were susceptible to misapplication or abuse.[3] Contrary to respondents' claim (Br. 28), these reports give significant "credibility" to the rationales supporting the honorarium ban: the interest in promoting integrity and the appearance of integrity; the need to prevent circumvention of rules; and the desire to minimize administrative burdens.

c. Respondents argue that the honorarium ban is broader than necessary (Br. 28-31), and that, because it has exceptions that permit some compensated speech, the ban is also fatally underinclusive (Br. 29) and indefensible as a "uniform" prophylactic rule (Br. 38-40). None of those submissions is correct.

First, the question whether it was appropriate to apply the ban where neither the speech nor the payment has a nexus to government employment (Resp. Br. 29) is not an issue easily subject to proof. Respondents argue (Br. 33)

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[3] See Gov't Br. 22-23. Respondents downplay (Br. 42 n.38) the conclusions of the GAO report by noting that it found "few instances of questionable conduct." But the GAO's discovery of several instances of questionable conduct in a survey of 11 agencies in a discrete period supports the inference that a wider survey would have discovered much more questionable conduct. The GAO report also undermines respondents' suggestion (Br. 30) that Congress could rely on existing "statutes and regulations that effectively forbid [employees] from engaging in any conduct—paid or unpaid, and expressive or non-expressive—that could give rise to impropriety or the appearance of impropriety." The GAO report makes clear that while those provisions were designed to prevent improper acts or appearances, they did not always do it "effectively."

that "the legislative record does not support the concern * * * that employee acceptance of 'honoraria' with no nexus to employment threatens integrity or creates a public perception of impropriety." At issue in this case, however, is whether Congress could make a "reasonable prediction[]" that those problems might frequently arise. *Waters* v. *Churchill*, 114 S. Ct. at 1887 (plurality opinion). The public could readily have suspicions, for example, about the receipt of honoraria by certain employees, such as prosecutors and procurement officials, regardless of the specific circumstances of the speech or payment. Thus, even respondents do not dispute the court of appeals' view that the receipt of any honorarium by an employee of the Internal Revenue Service could generate understandable "anxiety" in the public. Pet. App. 10a. On the other hand, the source of some honoraria will be a cause of concern regardless of the duties of the payee. Honoraria paid by a general circulation newspaper, for example, can be a source of concern if paid to any employee of a government agency that the publication has under investigation or scrutiny. The relevant issues for Congress are how much of the workforce and what types of activity should be included in order to alleviate public concern and minimize the risk of improprieties. In such matters of degree, where public employees are involved, this Court has consistently deferred to Congress's judgment. *United Public Workers* v. *Mitchell*, 330 U.S. at 101-102; Gov't Br. 26-27.

Second, while "underinclusiveness" may, in some cases, "diminish the credibility of the government's rationale for restricting speech," *City of Ladue* v. *Gilleo*, 114 S. Ct. 2038, 2044 (1994), here, the explanation for the exceptions from the honorarium ban (Resp. Br. 18-20, 29) does not have that effect: Congress simply had no reason to ban compensation that it did not believe

posed any significant problem. Indeed, the Wilkey Commission had stated that a "flat ban on outside earned income by all federal employees" would be "unnecessary and too harsh." *Wilkey Commission Report* 38 (J.A. 258). The Commission also indicated that "as we conceive of it, the bar on receipt of honoraria would not prohibit payment for continuing activities such as teaching academic, for credit, courses, or publication of a book through a recognized publishing house to be distributed through usual and customary channels." *Wilkey Commission Report* 36 (J.A. 254). Congress ultimately followed both suggestions: it did not prohibit all additional employment by federal employees, and it left open the possibility of earning honoraria for a "series" (*i.e.*, a continuing activity, see Gov't Br. 33-34) of appearances, speeches, or articles that are unrelated to federal employment. 5 U.S.C. App. 501(a) (Supp. IV 1992) (outside earned income limitation for most senior Executive Branch employees); 5 U.S.C. App. 505(3) (Supp. IV 1992) (exclusion of "series"). Those limitations indicate respect for the First Amendment interests of employees; they are certainly not a reason to invalidate the ban. See Gov't Br. 29 n.24.

Third, the honorarium ban is a legitimate prophylactic measure even though it applies differently in military contexts than in civilian ones, does not ban all outside compensation, and applies a more permissive rule to a "series" of appearances, speeches, or articles than it does to single-shot instances of paid expression. Resp. Br. 38-39. The exceptions do not make the ban "grey" (Resp. Br. 38); they make it tailored. And, contrary to respondents' assertion (Br. 39-40), the ban does reduce administrative costs, by limiting (although not eliminating) case-by-case judgments about the propriety of honoraria. By requiring some case-by-case judgments to

be made about honoraria while eliminating many, Congress struck a reasonable balance.

In arguing that the government has not justified the use of prophylactic rules in regulating honoraria, respondents are compelled to rely (Br. 40-42) on cases addressing the regulation of speech of private citizens. See *Turner Broadcasting*, *supra* (cable systems); *NAACP* v. *Button*, 371 U.S. 415 (1963) (civil rights group); *Edenfield* v. *Fane*, 113 S. Ct. 1792 (1993) (commercial speech); *Ibanez* v. *Florida Dep't of Business & Professional Regulation*, 114 S. Ct. 2084 (1994) (same). Those cases are inapposite here, because "constitutional review of government employment decisions must rest on different principles than review of speech restraints imposed by the government as sovereign"; the government has "extra power" to attain "its goals [as employer] as effectively and efficiently as possible." *Churchill*, 114 S. Ct. at 1887, 1888 (plurality opinion).

B. The Remedy. Respondents do not defend the breadth of the court of appeals' ruling as necessary to safeguard their constitutional rights; indeed, they state "that adherence to the precise remedial formulation adopted by the court of appeals is not, as a practical matter, crucial to vindication of respondents' First Amendment rights." Resp. Br. 45.

1. Respondents acknowledge that their objective was to secure a ruling that permitted them to receive compensation for expression that does not have a "nexus" to federal employment, *e.g.*, "writing and speaking that does not create either a real or apparent conflict with their federal employment." Resp. Br. 45. That objective, respondents concede (Br. 45-46), could "be achieved by a remedy similar to the one urged by the government—by holding the [honorarium] ban invalid as applied to respon-

dents' writing and speaking activities, which have no nexus to their federal employment."

If the absence of a "nexus" test is a constitutional flaw, respondents' concession makes clear that the remedy imposed by the court of appeals is insupportably overbroad. Because there is no need, even on respondents' theory, to invalidate all applications of the honorarium ban to Executive Branch employees in order to protect respondents' constitutional rights, the court of appeals' remedy must be reversed.[4]

2. Respondents argue that the court of appeals' remedy, while unnecessary, is nevertheless "defensible." Resp. Br. 46. The only effect of the broad invalidation ordered by the court of appeals, however, is to free from the constraints of the honorarium ban compensation that concededly could constitutionally be barred, *i.e.*, speech that does have a nexus to federal employment. It would be surprising if this Court's cases required that strange result, and, in fact, none of them does.

The relief ordered by the court of appeals would be justified only if respondents had met the requirements of the Court's overbreadth doctrine. See Gov't Br. 37, 41-43. Respondents, however, on whom the burden to demonstrate unconstitutional overbreadth lies, make no

[4] A remedy tailored to the violation, if one is found, would protect those payments where neither the speech nor the payor has a nexus to federal employment. In addition, it would apply only to respondents and the members of the plaintiff class, not (as the court of appeals held) to all Executive Branch employees. See Gov't Br. 36 n.27. The class consists of all federal employees in the Executive Branch below grade GS-16 who would be able to receive honoraria but for the prohibition contained in 5 U.S.C. App. 501(b) (Supp. IV 1992). J.A. 124-125. Higher level executive officials, whose claims may stand on a different constitutional footing, should not automatically be treated in the same way.

effort to show that the purported "overbreadth" of the honorarium ban is "not only * * * real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." *Broadrick* v. *Oklahoma*, 413 U.S. 601, 615 (1973). Instead, they argue that the honorarium ban has no "core" of constitutionally valid applications and has a large set of invalid applications. Resp. Br. 46, citing *Secretary of State of Maryland* v. *Joseph H. Munson Co.*, 467 U.S. 947, 965 (1984). But this is a case in which there is a clearly identifiable and substantial "core" of concededly valid applications of the honorarium ban: payment for appearances, speeches, and articles with a nexus to federal employment. And, given the procedure afforded in the statute to obtain advisory opinions, see Gov't Br. 42-43, the continued enforcement of this core presents no "risk of chilling free speech," which is the primary justification for permitting a "facial attack." *Joseph H. Munson Co.*, 467 U.S. at 968.

Nor is the statute here so significantly overinclusive that partial invalidation was not feasible, if, as the court of appeals held, honoraria can be prohibited only where there is a nexus to federal employment. Resp. Br. 46, citing *Simon & Schuster*, 112 S. Ct. at 511-512. If the constitutional litmus test is the presence of such a nexus, the court could have based its remedy on that precise principle, by holding the ban unconstitutional as applied to honoraria for appearances, speeches, and articles that have no nexus. If a nexus test is constitutionally required, there is no merit to respondents' endorsement (Br. 46-47) of the court's view that application of a nexus test would be a "purely legislative act."[5]

[5] Respondents' criticism of the government for failing to propose a "limiting construction" until seeking rehearing is

In sum, if there is a constitutional defect in the honorarium ban, it did not justify the overly broad remedy ordered by the court of appeals. Because that remedy violates the cardinal principle that a court should seek to invalidate no more of a statute than is necessary to protect the constitutional rights at stake, the remedy in this case should in all events be reversed.

Respectfully submitted.

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without merit. Resp. Br. 46 n.41. Not until the rehearing stage had the court of appeals adopted its theory that the honorarium ban was invalid for want of a nexus—and that the ban must therefore fall in *all* its applications to Executive Branch employees. And respondents' claim (Br. 47) that "the government in its brief suggests no specific alternative of its own" is simply wrong; our brief indicated that if the court were reluctant to apply its own constitutional test to fashion a remedy, it could alternatively have invoked the statutory nexus test applicable to a "series" of appearances, speeches, or articles. Gov't Br. 38 & n.28.